88-1205

Supreme Court, U.S.
FILED
JAN 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

TIMOTHY HAGGERTY,

Petitioner,

versus

CITY OF POMPANO BEACH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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60 pp

QUESTIONS PRESENTED

I. IS A MUNICIPALITY PROHIBITED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FROM REGULATING THE DESIGN, SIZE, AND PLACEMENT OF A POSTAL-APPROVED MAIL RECEPTACLE?

II. WHETHER ENFORCEMENT OF A MUNICIPAL ORDINANCE REGULATING THE DESIGN OF A MAIL RECEPTACLE INFRINGES UPON PETITIONER'S FIRST AMENDMENT FREEDOM OF EXPRESSION, WHERE THE DESIGN IS CONSISTENT WITH FEDERAL REGULATION AND DOES NOT CONSTITUTE A DANGER TO PERSONS OR PROPERTY?

LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this case are Timothy Haggerty and the City of Pompano Beach, Florida.

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NO. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

TIMOTHY HAGGERTY,

Petitioner,

versus

CITY OF POMPANO BEACH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioner, Timothy Haggerty, petitions for a writ of certiorari to review the judgment and decision of the District Court of Appeal of Florida, Fourth District, which upheld the authority of the City of Pompano

Beach to enforce its ordinances regulating the design, size, and placement of mail receptacles.

OPINIONS BELOW

The District Court of Appeal of Florida, Fourth District, announced its decision on August 31, 1988. City of Pompano Beach v. Haggerty, 530 So.2d 1023 (Fla. 4th DCA 1988) The court denied rehearing on October 4, 1988. Those decisions are reproduced in the Appendix. The final judgment of the trial court is also reproduced in the Appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Art. I, §8:

> The Congress shall have Power... To establish Post Offices and post Roads...

U.S. Constitution, Art. VI, Cl. 2:

> The Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...

U.S. Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...

U.S. Constitution, Fifth Amendment:

> No persons shall be deprived of life, liberty, or property without due process of law...

U.S. Constitution, Fourteenth Amendment:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law...

Ordinance 100.35, City of Pompano Beach:

> WHEREAS, the City has determined that private structures located in public right-of-way are detrimental to the public health, safety and general welfare; and

WHEREAS, the purpose of the public right-of-way is to provide a way of passage for the public, to provide an area for drainage, to provide an open area between the paved portion of the roadway and the placement of structures, to provide an area for the installation and maintenance of public utilities; therefore to allow private structures to be located in the public right-of-way would defeat the purpose of public right-of-way; and

WHEREAS, the United States Congress has given the United States Postal Service the authority to promulgate regulations regarding the delivery of mail pursuant to Section 39 USC 404(a)(1); and

WHEREAS, pursuant to this authority the United States Postal Service has recognized that a municipality has the authority to completely prohibit curbside mailboxes in the Domestic Mail Manual [sic] Section 111.1 and Section 155.27; and

WHEREAS, the City of Pompano Beach recognizes that the curb side delivery of mail serves a valid public purpose, and

WHEREAS, the City, rather than prohibiting mailboxes in public right-of-way as a structure, desires to exempt such receptacles

provided they do not exceed certain limitations and thereby defeat the purpose of public right-of-way,....

BE IT ENACTED BY THE CITY OF POMPANO BEACH, FLORIDA:

SECTION 1: That Section 100.35 of the Code of Ordinances of the City of Pompano Beach entitled "BUILDING OR OBSTRUCTION ON STREETS AND SIDEWALKS" is hereby amended to read as follows:

> 100.35 BUILDING OR OBSTRUCTION ON STREETS AND SIDEWALKS (A) It shall be unlawful for any person to erect build, construct, deposit or place on or in any street, or any place where the public has the right of passage, any building, structure, or obstruction of any kind whatsoever, or to enclose any street, park, or other public property. Provided however, that a receptacle for the actual curb side delivery of mail shall not be prohibited pursuant to this section as long as such receptacle does not exceed five feet in height and is securely mounted on posts no larger than four-inch by four-inch or four and one-half inch diameter wood posts or two inch diameter standard steel or aluminum pipe buried no more

> than 24 inches in the ground and the receptacle for mail is located in a manner which does not obstruct vehicular or pedestrian traffic or pose a public safety hazard.
> (B) Any building or structure abutting or encroaching on any public street, alley, or sidewalk in the city is hereby declared to be a public nuisance against the welfare and safety of the public, and the owner, lessee, or agent of the owner of any building allowing the building or structure to abut on or encroach on any public street, alley, or sidewalk, shall be held responsible to remove it and shall be guilty of a punishable violation.

STATEMENT OF THE CASE

Timothy Haggerty is a resident of the City of Pompano Beach, Florida. He has been engaged in a longstanding dispute with Pompano Beach officials concerning the design, size, and placement of his mailbox. In May 1982, Haggerty constructed an ornamental mailbox which he located in the swale area in front of his home. Nine

months later (February 1983), the City of Pompano Beach notified Haggerty that the placement of the mailbox in the City's right-of-way violated Municipal Ordinance 100.35. This ordinance prohibited the construction or placement of private structures or obstructions in the public right-of-way. The ordinance empowers City officials to issue citations for violations of the ordinance and provides for the removal of offending structures. When Haggerty refused to remove his mailbox, Haggerty was charged with a criminal violation of the ordinance.

In June 1983, Haggerty was found not guilty of the ordinance violation on the basis of selective enforcement of the municipal code. The evidence reflected that no other City resident had been prosecuted for this ordinance violation, despite the fact

that residents typically position mailboxes in the City's right-of-way. That decision was reversed by the appellate court. On retrial, Haggerty was found guilty, but that verdict was again reversed by the appellate court.

Haggerty then removed the original mailbox, and soon thereafter constructed a new one. This mail receptacle, still located in the swale, contains a flag pole upon which the American flag was flown. The mailbox was anchored below the surface by two engine blocks, which supported two pipes rising fifteen feet in the air. The mailbox complied with all postal regulations, and had been approved by Post Office inspectors.

When it became apparent that the City was intending to prosecute Haggerty anew, Haggerty initiated an action seeking injunc-

tive and declaratory relief against enforcement of the ordinance. Haggerty prevailed in that lawsuit, with the trial judge announcing a number of findings and conclusions in Haggerty's favor, including: (1) The City had received no notice from Postal Authorities that the mailbox violated postal regulations. (2) No other resident had been prosecuted for having placed a mailbox in the right-of-way, despite the fact that mailboxes were routinely placed in that location. (3) The mailbox did not constitute a hazard to persons or property. (4) The City ordinance ran afoul of the Supremacy Clause of the United States Constitution. (5) Haggerty was the victim of unconstitutional selective enforcement of the law. (6) Application of the City ordinance infringed upon Haggerty's First Amendment freedom of expression.

The City appealed from the order granting declaratory and injunctive relief. The appellate court agreed with the City's position, and reversed the trial court's order. City of Pompano Beach v. Haggerty, 530 So.2d 1023 (Fla. 4th DCA 1988). The appellate court concluded that the City's revised ordinance applied to Haggerty's mail receptacle and could be enforced.

REASONS FOR GRANTING THE WRIT

I. A MUNICIPALITY IS PROHIBITED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FROM REGULATING THE DESIGN, SIZE, AND PLACEMENT OF A POSTAL-APPROVED MAIL RECEPTACLE.

This case raises a fundamental question of the extent to which a municipality can exercise jurisdiction in an area which is reserved to the federal government. The case itself pits a citizen, interested in expressing his artistic values concerning

the United States mails, and a local government set on quashing the citizen's right of expression. The particular object of this controversy, a mail receptacle, was designed by the citizen in a manner which comports with federal regulation, was situated in a location utilized by other citizens to receive their mail, and constituted no obstruction or potential injury to persons or property. The municipality, in it quest to rid the City of a mail receptacle which was not to its liking, enacted an ordinance which purported to regulate the design, size, and placement of mailboxes, and vest unbridled discretion in City officials. In so doing, the City overreached the bounds of its governmental authority and intruded into an area which is reserved to the federal government.

This case merits review by this Court because of the conflict between the Supremacy Clause and the decision of the lower tribunal. The important question of law presented in this appeal - the extent to which a municipality can attempt to regulate the United States mail - is a matter which requires the binding guidance of this Court, in order to prevent systematic intrusions into the needed uniformity of mail service. Without a final settlement of this matter, municipalities will be permitted to restrict the free flow of the United States mail by regulating the design, size, and placement of approved mail facilities. In so doing, the free flow of communication in our country will suffer an intolerable blow.

The United States Constitution provides that the laws of the United States represent the supreme law of the land. U.S. Const.,

Art. VI. One area in which the federal government is supreme is that involving postal services and the mails. As established by Article I, §8, the Congress has the exclusive power to regulate the mails. Congress has followed that constitutional mandate by giving to the United States Postal Service the exclusive authority to regulate and provide postal services to the people of the United States. 39 U.S.C. §101.

By virtue of that power, the Postal Service operates to provide prompt, efficient delivery of the mails. One necessary ingredient to that desirable goal is that of approving the use of mail receptacles and mailboxes, which promote the security of the mails and the convenience of delivery. It is the responsibility of the Postal Service to control the use of such receptacles.

Where a municipality acts to alter the carefully controlled and implemented scheme of the United States Postal Service concerning the delivery of the mails, the local government is outside the scope of its authorized powers.

Curiously, there exists very little litigation concerning the issue presented in this case, presumably because relevant decisions involving a conflict between postal authorities and local governments side unanimously in favor of the postal authorities. The only exception is the instant case. For example, the case of Black v. City of Berea, 32 N.E.2d 1 (Oh. 1941), involved a personal injury lawsuit against the city due to the plaintiff suffering injuries when her arm struck a mailbox located on the side of the road while she was riding as a passenger in an automo-

bile. The Ohio Supreme Court rejected the plaintiff's contention that the city was liable because, **as a matter of law**, the mailbox was not a nuisance since it was situated in a similar manner to other mailboxes in the area and the city had received no notice from the Post Office Department that the receptacle was contrary to postal regulations. The essence of the court's decision is succinctly stated, at 7:

> The postal patron derives his right to place a mailbox on a post road where such box is accessible to a mail carrier without leaving his vehicle, from the Constitution of the United States and laws enacted thereunder. It would seem clear, therefore, that the municipal authorities could take no action in respect to the location of the mailbox on a post road, unless and until it had been brought to their attention that such box was not located as required by the Post Office Department.

Berea conducted an exploration of the history of federal regulations in this area,

and concluded that federal control of postal receptacles was exclusive, at 6:

> While a city council might pass an ordinance attempting to regulate the location of rural mailboxes, yet before any such mailbox could be declared a nuisance, either under or in the absence of such ordinance, it would be necessary to show that it had not been so placed on a post road with the approval of an agent of the Post Office Department.
>
> We must not lose sight of the statement of law made by the Attorney General of the United States [opinions of Attorney General, Vol. 31, Page 73 (12-27-16)]: 'It follows that the fundamental test is not, whether the attempted State exertion will affect the exercise of a federal function to an extent that will demonstrably impair or impede the exercise of such function; it need only appear that the State has thereby in any degree laid its regulative hand upon such function.'

Against a claim that the municipality was indirectly responsible for the placement of mailboxes due to a local ordinance which entrusted the care, supervision, and control

of public highways to the city, the Court rejected the view that the ordinance justified any interference with the location of mailboxes. A municipal ordinance which attempts to conflict with or modify the superior power of the federal government with respect to postal matters and post roads is unquestionably in conflict with the exclusive federal jurisdiction in this area. Id. at 7.

The Berea decision was analyzed in Annotation, 132 A.L.R. 1401 (1941). That annotation reaffirmed the position that a local government has no ability to control or interfere with the design or placement of mail receptacles:

> To summarize the rulings laid down by these authorities, it appears that a city has no right to control or proscribe the design or style of letter boxes installed or to be installed upon its streets or parks or elsewhere within its limits; that a city has no right to proscribe the location

> of the mailbox placed by a patron of the rural mail route in accordance with the regulations of the Post Office Department and hence is under no duty to cause to be removed or be relocated a mail box which is so placed as to obstruct or be hazardous to travel upon the street, unless and until it is advised that such mailbox is not located in compliance with the regulations of the Post Office Department.

This standard is consistent with the position advanced by Haggerty and opposed by the Respondent and the lower tribunal. It is without dispute that neither Haggerty nor the City received any notice from the Postal Service that Haggerty's mail receptacle was not in compliance with postal regulations. To the contrary, a postal inspector examined Haggerty's mailbox and approved it as being in compliance with applicable regulations. Haggerty's mail receptacle was not unsafe and did not constitute an obstruction to pedestrian or vehicular traffic, nor did it

interfere with any utilities. Thus, the City had no lawful basis to challenge the placement of Haggerty's mailbox on public safety grounds. Yet, when the City attempted to impose its own regulations upon the postal functions which are exclusively within the control of the federal government, the City went too far. Such local regulations must fall under the Supremacy Clause.

This is not a situation involving one man's desire to erect a mailbox which is to his liking. Instead, the case transcends individual interests in focusing on the relationship between federal and local governments in an area which traditionally has been the sole concern of the federal government. Permitting a municipality to enact its unilateral laws affecting the design, size, and placement of mail recep-

tacles is just the beginning of an encroachment into the regulation of the mails. No matter how pure is the local government's interest in limiting roadside structures, it is the Postal Service which has sole control over structures which are necessary for delivery of the mails. Indeed, by permitting curbside delivery of the mails, the Postal Service has promoted the efficiency and economics of mail delivery, thus exercising its exclusive authority over postal costs. This economic concern is of considerable moment to the Postal Service. See Grover City v. U.S. Postal Service, 391 F.Supp. 982 (C.D.Cal. 1975).

Supremacy Clause litigation supports the position taken by Haggerty in this certiorari petition, that the lower tribunal acted contrary to the Constitution and existing precedent in allowing the City to

regulate the design, size, and placement of his mail receptacle, where such placement did not constitute a nuisance, an obstruction, or a hazard to the public safety. Where federal law has pre-eminence, as in postal regulations, local and state law which stands as an obstacle is void. New York State Commission On Cable Television v. F.C.C., 669 F.2d 58 (2d Cir. 1982).

One analogous area of federal supremacy is that of air traffic. When a municipality attempted to enact noise control ordinances which interfered with the progress of air traffic, the ordinance was held unenforceable in violation of the Supremacy Clause. Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983). Similarly, in United States v. City of Pittsburgh, 661 F.2d 783 (9th Cir. 1981), a municipal trespass ordinance was declared void where it had the

effect of requiring postal letter carriers to obtain consent from residents before crossing lawns in the course of delivering the mail. The court viewed the ordinance as interfering with the duty of the Postal Service to deliver mail efficiently, and thus struck down the ordinance.

Petitioner requests this Court to review the decision of the lower tribunal, which permits local authorities to reign supreme in matters of postal regulations, when that area is constitutionally reserved to the federal government. This case is important, because it spans the reach between effective and efficient postal services and the unilateral will of local governments to regulate mail receptacles as if they were not part of the federal postal scheme. This case presents a critical opportunity for this Court to bring clarity

to this extremely important area of constitutional law. So that the concerns of the Framers of our Constitution are served, this Court must issue its writ of certiorari to correct the manifest injustice and error found herein.

II. ENFORCEMENT OF A MUNICIPAL ORDINANCE REGULATING THE DESIGN OF A MAIL RECEPTACLE INFRINGES UPON PETITIONER'S FIRST AMENDMENT FREEDOM OF EXPRESSION, WHERE THE DESIGN IS CONSISTENT WITH FEDERAL REGULATION AND DOES NOT CONSTITUTE A DANGER TO PERSONS OR PROPERTY.

The Constitution authorizes local government to act in the public interest by regulating the activity of its citizens in certain matters. Such governmental authority cannot, under any circumstances, limit the constitutional and organic rights of the individual. Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). Among the constitutional rights which are protected from

unwarranted government interference are those guaranteed by the first amendment to the United States Constitution. Governments may not restrict such freedoms without a clear demonstration of a compelling government interest. Beverly v. United States, 468 F.2d 732 (5th Cir. 1972). Even where a local government submits the existence of compelling interest as a supporting basis for an ordinance, any such restrictive law must be narrowly drawn so as to involve no more infringement than is absolutely necessary. First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407 (1978); Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976). Government regulation in the freedom of expression area is justified only where (1) the regulation is within the government's constitutional power; (2) the regulation furthers an important or substan-

tial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on first amendment freedoms is no greater than necessary to the furtherance of the governmental interest.

In the case before this Court, the City has offered a substantial government interest as a basis to stifle Haggerty's artistic and expressive freedom in connection with his design of a mail receptacle. The City's asserted interest, protecting the safety of persons and property and avoiding interference with the operation of utilities, is a worthwhile goal in the abstract. This interest is essentially unrelated to the suppression of free expression. Nevertheless, the method used by the City to enforce the ordinance and the City's selective enforcement of the ordi-

nance renders the City's regulation unavoidably in conflict with first amendment guarantees.

Petitioner recognizes that the first amendment does not require the voiding of a content-neutral regulation, which is enforced in a neutral manner, that merely burdens speech in an incidental way. United States v. Albertini, 472 U.S. 675, 105 S.Ct. 2897 (1985). Thus, even though the mail receptacle in this case was shown to constitute no obstruction or hazard to pedestrian or vehicular traffic, if the ordinance were enforced in an even-handed manner, Petitioner would have little complaint were the ordinance the least restrictive alternative available to the City. That is not the case here, as even the decision of the lower tribunal suggests. Because the burden on Haggerty's expression is greater than is

necessary and because the regulation itself does not promote a substantial government interest that would be achieved less effectively absent the regulation, first amendment concerns must take precedence. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968).

The ordinance in this case is a tool utilized by City officials at their discretion and whim, aimed at residents whose conduct is not to the City's liking rather than pursued in an above-board and even-handed manner. Where an ordinance which makes the enjoyment of guaranteed rights contingent upon the whim or caprice of a government official, the law represents unconstitutional censorship. See Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984).

The decision of this Court in Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365 (1983), demonstrates the propriety of Haggerty's claim. There, this Court noted that different treatment of those subject to an ordinance which incidentally infringes first amendment rights suggests that the regulatory goal is related to suppression of those rights, and thus the goal is presumptively unconstitutional. This same standard was utilized by the Court in Police Department of City of Chicago v. Mosley, 408 U.S. 92, 93 S.Ct. 2286 (1972), where the City of Chicago enacted an ordinance exempting peaceful labor picketing from its general prohibition on picketing near a school. This Court indicated that because city officials treated some picketing in a different manner from others, the

ordinance should be analyzed in terms of the Equal Protection Clause of the Fourteenth Amendment, which was closely intertwined with first amendment interests. Because the ordinance affected expressive conduct, it was unconstitutional in making an impermissible distinction between peaceful labor picketing and other peaceful picketing.

The ordinance in Haggerty's case and the City action utilized to enforce it deserve careful review by this Court. Although the City's ordinance was not intended to be applied to mailboxes, the ordinance was used to prohibit Haggerty's mail receptacle, even though other similar mailboxes in the City's right-of-way existed which were not made subject to the ordinance. City officials simply did not find favor with Haggerty's expression, and thus acted against him. This different treatment

suggests that the goal of the ordinance, as applied, was not unrelated to the suppression of Haggerty's expression, and thus the ordinance is presumptively unconstitutional as applied.

Because of the clash between individual expression and the scope of government regulation, a question which often pits local governments against the individual, this Court should evaluate the propriety of the municipal conduct. It is not appropriate for an individual, when expressing thoughts through artistic conduct, to be subservient to contrary governmental interests, where the individual's conduct is not threatening or dangerous to persons or property. The decision of the lower tribunal completely glosses over this critical constitutional issue. To prevent other municipalities from acting in the same

manner and to protect the individual in relations with local governments, this Court should grant certiorari review. Only by accepting this case can this Court protect the individual from this unnecessary and unlawful governmental assault.

CONCLUSION

For the reasons stated, this Court should grant a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT, P. O. BOX A, WEST PALM BEACH, FLORIDA 33402

CITY OF POMPANO BEACH,

Appellant,

v. **CASE NO. 87-0442**

TIMOTHY HAGGERTY,

Appellee.

October 4, 1988

BY ORDER OF THE COURT:

ORDERED that Appellee's September 15, 1988 Motion for Rehearing is denied.

I hereby certify the foregoing is
a true copy of the original court order.

CLYDE L. HEATH
CLERK.

cc: Robert L. Bogen, Esq.
Sharon V. Delegal, Assistant City Attorney

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1988

CITY OF POMPANO BEACH,	)	**NOT FINAL UNTIL**
	)	**TIME EXPIRES TO**
Appellant,	)	**FILE REHEARING**
	)	**MOTION AND, IF**
v.	)	**FILED, DISPOSED**
	)	**OF.**
TIMOTHY HAGGERTY,	)	
	)	**CASE NO. 87-0442.**
Appellee.	)	
	)	

Opinion filed August 31, 1988

Appeal from the Circuit Court for Broward County; Robert C. Abel, Jr., Judge.

Sharon V. Delegal, Assistant City Attorney, Pompano Beach, for Appellant.

Robert L. Bogen of Braverman & Bogen, Fort Lauderdale, for Appellee.

DOWNEY, J.

Appellee, Timothy Haggerty, placed his "mailbox" in the swale in the public right-of-way beside the street in front of his house. Appellant, City of Pompano Beach, advised him that the mailbox, its mounting and its supporting members violated Ordinance

100.35 and ordered him to remove it. Haggerty refused and this litigation ensued.

Ordinance 100.35 of the City of Pompano prohibited the construction or placement of private structures or obstructions of any kind in the public right-of-way. Ordinance 100.39 authorizes city officials to issue citations for violations of the ordinance and provides for the removal of unauthorized obstructions.

The evidence showed that, in order to position the mailbox in the swale area, Haggerty apparently dug a large hole between the sidewalk and street and placed therein two truck engine blocks. The engine blocks serve as anchors for two one and one-half-inch water pipes that rise about fifteen feet into the air. Two horizontal bars are connected to the vertical pipes. The receptacle to receive the mail is attached to the

first horizontal bar approximately three feet from the ground. The second horizontal bar is located several feet above the mailbox. From the second bar, a two-inch gas pipe functions as a flagpole, extending approximately another nine feet into the air. At its widest part the structure supporting the mailbox is five or six feet wide. A newspaper article in the record describes the contraption as containing an old bed rame, part of a golf cart, and it was topped by a model airplane and an "Air Mail" designation. After the city had won round one of the ongoing litigation between the parties, the city, pursuant to Ordinance 100.39, removed the edifice entirely. When Haggerty won the next round, he rebuilt the mailbox and "accoutrements" in essentially the same form, except he added a flagpole with an American flag attached to it.

When Haggerty initially refused to heed the city's notices of violation, thematter wound up in the Broward County Court, resulting in a decision in Haggerty's favor. On appeal to the circuit court, that decision was reversed and remanded to the county court, where an order to remove the structure was entered. The city removed the structure and Haggerty appealed to the circuit court, which again reversed the county court on double jeopardy grounds. When the city notified Haggerty that it intended to further prosecute him for ordinance violation, Haggerty commenced this suit in the circuit court for injunctive and declaratory relief. The city has perfected this appeal from a judgment for Haggerty permanently enjoining enforcement of Ordinances 100.35 and 10039 against Haggerty, holding Ordinance 100.35 invalid on constitutional grounds, and

enjoining the city from further prosecuting Haggerty for construction of the mailbox structure.

Haggerty contends, on appeal, 1) that the ordinances in question violate Article VI, the Supremacy Clause, of the United States Constitution, to the extent they attempt to regulate the design an dlocation of mailboxes and their structures and supports, 2) that the city's selective enforcement of said ordinances violates Haggerty's right to equal protection of the law, 3) that the ordinances violate the due process clause of the federal and state constitutions by taking property without compensation, 4) that the city's attempts to remove Haggerty's structure with its flagpole for flying the American flag violates the first amendment in that it stifles Haggerty's right to free expression, and 5) that the ordinances have no standards

by which to determine the size and dimension of an appropriate mailbox and, thus, lend themselves to arbitrary application.

The city argues that there is no supremacy act violation in these ordinances because they do not conflict with any federal regulation regarding mailboxes and federal regulations specifically recognize a municipality's authority to act in this area. Domestic Mail Manual (DMM), §155.27. Next, the city contends there has been no showing of selective enforcement of the ordinances and, thus, no equal protection violation; no taking and, thus, no due process problem. Finally, the city argues that neither is there a first amendment violation involved because municipal regulations prohibiting private structures in public rights-of-way, in order to keep them open and available for proper public use, meet the test set for them in

United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

Since this appeal has been pending the city amended Ordinance 100.35 by Ordinance 87-30, which provides in pertinent part:

> WHEREAS, the City has determined that private structures located in public right-of-way are detrimental to the public health, safety and general welfare; and
>
> WHEREAS, the purpose of the public right-of-way is to provide a way of passage for the public, to provide an area for drainage, to provide an open area between the paved portion of the roadway and the placement of structures, to provide an area for the installation and maintenance of public utilities; therefore to allow private structures to be located in the public right-of-way would defeat the purpose of public right-of-way; and
>
> WHEREAS, the United States Congress has given the United States Postal Service the authority to promulgate regulations regarding the delivery of mail pursuant to

Section 39 USC 404 (a)(1); and

WHEREAS, pursuant to this authority the United States Postal Service has recognized that a municipality has the authority to completely prohibit curb side mailboxes in the Domestic Mail Manual [sic] Section 111.1 and Section 155.27; and

WHEREAS, the City, rather than prohibiting mailboxes in public right-of-way as a structure, desires to exempt such receptacles provided they do not exceed certain limitations and thereby defeat the purpose of public right-of-way,...

BE IT ENACTED BY THE CITY OF POMPANO BEACH, FLORIDA:

SECTION 1: That Section 100.35 of the Code of Ordinances of the City of Pompano Beach entitled "BUILDING OR OBSTRUCTION ON STREETS AND SIDEWALKS" is hereby amended to read as follows:

100.35 BUILDING OR OBSTRUCTION ON STREETS AND SIDEWALKS

(A) It shall be unlawful for any person to erect build, construct, deposit or place on or in any street, or any place where the public has the right of passage, any building, structure, or obstruction of any kind whatsoever, or to enclose any street, park, or other public property. Provided however, that a receptacle for the actual curb side delivery of mail shall not be prohibited pursuant to this section as long as such receptacle does not exceed five feet in height and is securely mounted on posts no larger than four-inch by four-inch or four and one half-inch diameter wood posts or two inch diameter standard steel or aluminium pipe buried no more than 24 inches in the ground and the receptacle for mail is located in a manner which does not obstruct vehicular or pedestrian traffic or pose a public safety hazard.

(B) Any building or structure abutting or encroaching on any public street, alley, or sidewalk in the city is hereby declared to be a public nuisance against the welfare and safety of the public, and the owner, lessee, or agent of the owner

> of any building allowing the building or structure to abut on or encroach on any public street, alley, or sidewalk, shall be held responsible to remove it and shall be guilty of a punishable violation.

(Emphasis indicates new language.) Thus, at the present time the city still prohibits the placing of structures in the right-of-way except for mailboxes, which cannot exceed certain specifications. The amended ordinance is in reality a ratification and clarification of the administrative construction given its predecessor, Ordinance 100.35, much as was done in Tsavaras v. Lelekis, 246 So.2d 789 (Fla. 2d DCA), cert. denied, 249 So.2d 687 (1971), and approved by this court in Town of Palm Beach v. Royal Palm Beach Hotel, Inc., 298 So.2d 439 (Fla. 4th DCA 1974). As noted by the city in the instant case:

> The city ordinance while prohibiting all private structures and obstructions has always been interpreted to permit mailboxes as such

> facilities were not seen as structures. The ordinance has merely been amended to include the administrative interpretation of the ordinance as it applies to mailboxes and should therefore be applied to the matter before this court.

Appellee, Haggerty, has failed to address the city's contentions in this regard.

It is a rule of long standing that appellate courts will dispose of the case according to the law prevailing at the time of the appellate decision rather than the prevailing law at the time of the trial court's decision. Diffenderfer v. Central Baptist Church of Miami, 404 U.S. 412, 92 S.Ct. 574, 92 L.Ed.2d 567 (1972); Florida East Coast Railway v. Rouse, 194 So.2d 260 (Fla. 1966); Tsavaras v. Lelekis, 246 So.2d 789 (Fla. 2d DCA 1971). There is no fear of ex post facto legislation or improper retroactive application of the amended ordinance

here because there is no impairment of a contract obligation or vested right and the amended ordinance appears remedial in that it creates an exemption. See 49 Fla.Jur.2d Statutes §106, et seq. (1984). Moreover, "a mere change of language in a statute does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law." Id. §134. See also State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973). Thus, it appears that, as in Tsavaras v. Lelekis, 246 So.2d 789 (Fla. 2d DCA 1971), because the ordinance in question did not change the existing law, but simply confirmed the city's interpretation of the ordinance and clarified its language, the amended ordinance should be applied.

If there remained any doubt about the effect of the clarification amendment and Haggerty's compliance with said ordinance we might resort to a temporary relinquishment of jurisdiction to allow the court to reconsider its judgment, as mentioned in Lelekis or a remand for further consideration as was done in Twon of Palm Beach v. Royal Palm Beach Hotel, Inc., 298 So.2d 439 (Fla. 4th DCA 1974). However, here there is no doubt that Haggerty is totally out of sinc with the purpose and intent of the prohibition against structures in the city's right-of-way, to say nothing of the specific limitations on size now spelled out in the amendatory ordinance.

Accordingly, we reverse the judgment appealed from and remand the case to the trial court with directions to enter judgment for the appellant, City of Pompano Beach.

WALDEN and GUNTHER, JJ., concur.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA.

CASE NO. 84-18276-CN

TIMOTHY HAGGERTY,	)	
	)	
Plaintiff,	)	
	)	**FINAL JUDGMENT**
v.	)	
	)	
CITY OF POMPANO BEACH,	)	
	)	
Defendant.	)	
	)	

THIS ACTION way tried before the Court. On the evidence presented, the Court makes the following findings of fact:

On or about May 31, 1982 Plaintiff constructed an unusually designed, rather ornate mailbox placed on the swale. On or about February 24, 1983, Defendant instituted proceedings for violation of Municipal Ordinance 100.35 for placing a mailbox in the City's right of way. On June 1, 1983 a nonjury trial was held before County Court Judge Mowry in which Plaintiff was found not

guilty on the basis of selective enforcement. Upon appeal this was reversed in the Circuit Court, Judge Coker presiding. On June 8, 1984, County Court Judge June Johnson found Plaintiff guilty of violating the Ordinance and he was required to remive the mailbox within 60 days. Upon further proceedings in the Appellate Court, Judge Mark A. Speiser presiding, this decision was reversed.

On August 21, 1984, Defendant, pursuant to the purported authority of Pompano Beach Municipal Ordinance 100.39, removed the mailbox. On or about August 27, 1984 Plaintiff constructed a second mailbox, this one containing a pole upon which the American Flag was flown. Such was also placed on the swale. Both mailboxes were located within the City's right of way. On August 28, 1984 and August 30, 1984, Defendant by certified mail, delivered to Plaintiff its notice of

intention to further prosecute Plaintiff for violation of Municipal Ordinances 100.35 and 100.39 based on the construction of the second mailbox. This action sought a permanent injunction prohibiting Defendant from removing the mailbox and a declaratory judgment determining that the subject ordinances were invalid.

The Court further finds, based upon the trial exhibits and testimony of witnesses, as follows:

The City has not received a notice from postal authorities that the subject mailbox was not in compliance with postal regulations. No citizen of the City of Pompano Beach, other than Plantiff, has been prosecuted under the subject ordinances for having placed a mailbox in the City's right of way, although other citizens have customarily used the City's right of way for mailboxes. The

mailbox is not a hazard to pedestrians or vehicular traffic and does not obstruct such traffic.

The Court makes the following conclusions of law:

Article VI, U.S. Constitution, containing the supremacy clause, prohibits the enforcement of the City of Pompano Beach Municipal Ordinances 100.35 and 100.39 insofar as they attempt to regulate the design and location of mailboxes and their structure and supports.

Plaintiff's Constitutional Equal Protection Rights have been violated according to the authority of Yick Wo vs. Hopkins, 118 U.S. 356, 373 (1886), in that while other citizens have been allowed to build mailboxes in the City's right of way, Defendant has been selected for prosecution under the

subject ordinances. See also Richey vs. Wells 166 So 817 (1936).

Both Federal and State Constitutions prohibit the taking of property without due process. Holland vs. Fort Pierce Financing & Construction Co. (1946) 157 Fla 649, 27 So 76; State Road Department of Florida vs. Tharp (1941) Fla 745, 1 So 2d 868. Defendant is prohibited from confiscating Plaintiff's property without compensation since the subject ordinances are not necessary for the preservation of public health or safety. Maxwell vs. Miami (1924) 87 Fla 107, 100 So 147, 33 ALR 682; Scoville vs. Miami Springs (1954) 6 Fla Supp 94, affd (Fla) 81 So 2d 188.

Plaintiff's flying of the American Flag is a method of expression within the freedoms guaranteed by the First Amendment to the U.S. Constitution. The ordinances in question are

unconstitutional insofar as they attempt to prohibit such expression. Miami Beach vs. Koehle 20 Fl Supp 121 (1973).

An enactment under the exercise of police power which is lawful on its face may not be enforced in such manner as to work a discrimination Miami Beach vs. Ben Howe Realty 168 Fl 2d 378; Franklin vs. White Egret Condominium 358 So 2d 1084. The actions of the City in the case sub judice as it affects this Plaintiff are contrary to said "Franklin" case supra.

The City has no standard for determining how any mailbox built within the City is not in compliance with City Ordinances. Defendant's enforcement of the ordinances are arbitrary, contrary to law and an unconstitutional attempt by the City to use its Police Power under the facts sub judice.

It is ADJUDGED as follows:

1. Defendant is permanently enjoined from enforcing its Ordinances 100.35 and 100.39 and other ordinances purporting to authorize the removal of the mailbox and or appurtenances, supports and attachments thereto, including the American Flag as constructed by Plaintiff at the premises 1650 N.W. 1st Terrace, Pompano Beach, Florida, on or about August 21, 1984.

2. Said ordinances are invalid insofar as they purport to authorize the removal of the said mailbox, its appurtenances and attachments and to the extent that they purport to do so, said ordinances are hereby declared unconstitutional.

3. Defendant is permanently enjoined from prosecution of Plaintiff under the authority of its Ordinances 100.35 and 100.39 for the building or maintaining of the mail-

box built on his premises on or abuot August 21, 1984.

4. This Court reserves jurisdiction for the purpose of enforcing the provisions of this Final Judgment.

5. This Court reserves jurisdiction for the purpose of awarding costs.

ORDERED at Fort Lauderdale, Broward County, Florida on this the ____ day of (Jan 19 1987), 1987.

JUDGE ROBERT C. ABEL, JR.
CIRCUIT JUDGE

Copies Furnished:

A TRUE COPY

Counsel of Record